OCT 27 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 362

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

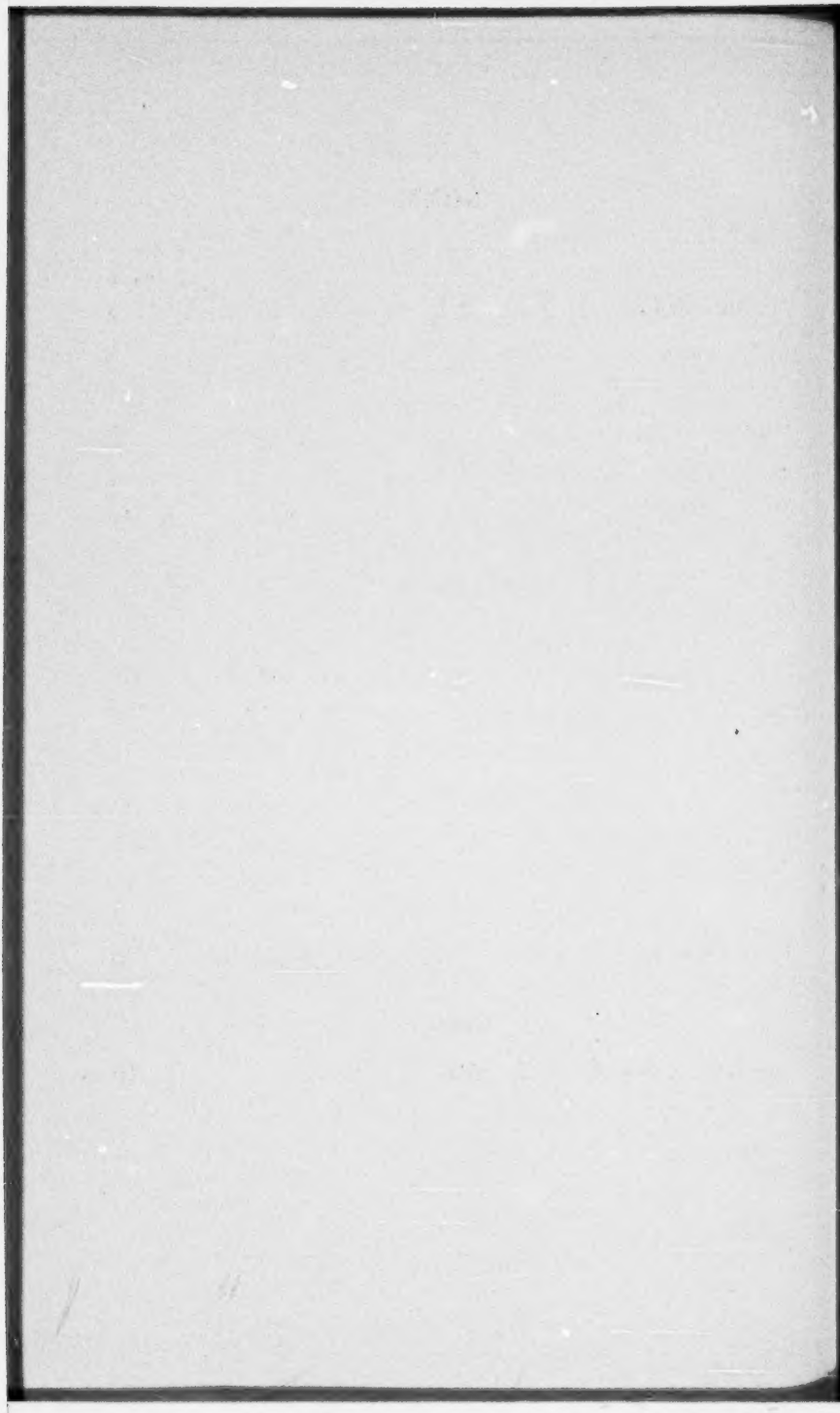
WINSTON THEATRE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE L. SIEGEL,
EDWARD C. RAFTERY,
Attorneys for Respondent, Winston Theatre Corporation.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO



INDEX.

	PAGE
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement of the case	2
Argument	4
Conclusion	11

CITATIONS.

Cases.

American Press Association v. U. S., 245 Fed. 91	10
Bigelow v. Balaban & Katz Corp., 199 F. 2d 794	5, 6
Ladner v. Siegel, 298 Pa. 487, 148 Atl. 699	10
Tobin v. Alma Mills, 194 F. 2d 133	10
U. S. v. Swift & Co., 286 U. S. 106	6, 10

Rules.

Federal Rules of Civil Procedure, Rule 60(b)(5)	10

Texts.

Annotation, 68 A. L. R. 1180	10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 362.

FLORENCE B. BIGELOW, ET AL.,
Petitioners,

vs.

RKO RADIO PICTURES, INC., ET AL.,
Defendants,

WINSTON THEATRE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINION BELOW.

The opinion of the Court of Appeals is reported in 205 Fed. 2d 231.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 USC Par. 1254(1). The judgment of the Court of Appeals was entered on June 23, 1953.

QUESTIONS.

The questions stated by petitioners are not involved in this case. The questions urged by the respondent and decided by the Court of Appeals are as follows:

1. Whether, as a result of the divorcement, the Grand Theatre is no longer "a theatre owned, leased or operated by any defendant" within the meaning of the decree of October 16, 1946.

2. Whether the change in conditions, including the divorcement and the hardship suffered by the Grand Theatre, make it no longer equitable that the injunction should continue with respect to the Grand Theatre.

Statement of the Case.

Winston Theatre Corporation, operator of the Grand Theatre in Chicago, filed its intervening petition for an adjudication that it is not subject to the decree of October 16, 1946, which, among other provisions, imposed certain restrictions on theatres "owned, leased or operated by any defendant."

Winston Theatre Corporation was organized almost a year after this suit was filed, and commenced operating the Grand Theatre in May 1950. It is not a defendant in this case. (R. 74-75.) It had been subject to the decree entered October 16, 1946, because it was controlled by the same parent company that controlled one of the defendants, RKO Radio Pictures, Inc., a condition that no longer prevails.

Pursuant to the decree of divorcement in the *Paramount* case, the affiliation of Winston Theatre Corporation with the defendant RKO Radio Pictures, Inc. was completely

severed commencing January 1, 1951. Since that date, Winston Theatre Corporation has in no way been connected with the defendant RKO Radio Pictures, Inc. or its parent companies. RKO Radio Pictures, Inc. and its parent companies do not own any stock in Winston Theatre Company or its parent companies; nor does Winston Theatre Company or its parent companies own any stock in RKO Radio Pictures, Inc., or its parent companies. Each is enjoined from having any common directors, officers, agents or employees; and each is enjoined "from attempting to control or influence the business or operating policies of the other by any means whatever." The facts of the divorcement are set forth in the opinion of the Court of Appeals and are established by uncontradicted evidence. (Pet. Ex. 1, R. 176, 195, 196; Pet. Ex. 4, R. 199-200; Pet. Ex. 5, R. 201; Pet. Ex. 6, R. 202; Pet. Ex. 20, R. 241-2; Pet. Ex. 21, R. 254-256; R. 75-80; R. 117, 121.)

The record also shows the great hardship suffered by the Grand Theatre subsequent to the divorcement. Prior to the divorcement, a stipulation approved by the court permitted the film distributors to license films at the Grand Theatre for more than two weeks. Subsequent to the divorcement, the stipulation became ineffective, and the film distributors have not permitted the Grand Theatre to bid for pictures on runs longer than two weeks because claim had been made that the 1946 decree prevents them from doing so. Accordingly, the Grand Theatre has been unable to bid effectively for the better pictures, and for the first six months of 1952, its operating loss was $108,000, compared with a modest profit of approximately $12,000 for the previous year when it was able to exhibit some pictures on longer runs. (R. 118, 120, 135, Pet. Ex. 11, R. 207.)

The trial court recognized the hardship upon the Grand Theatre, stating (R. 173), "I sympathize with your difficulty. I do not know what the way out for them is"—but

denied relief. The Court of Appeals reversed and remanded, holding that the decree did not necessarily apply to the Grand Theatre in perpetuity, and that if the decree of divorcement is being carried out in good faith, and the Grand Theatre is not controlled by any defendant, the Court should find that the Grand Theatre is not a theatre owned, leased or operated by a defendant.

Argument.

The petition does not present any reason to justify a review by this Court. No conflict of decisions nor questions of general importance are involved. The Court of Appeals reversed and remanded; and although evidence was introduced at the trial and petitioners had full opportunity to introduce such evidence as they desired, the Court of Appeals ruled that the district court in its discretion may give petitioners another opportunity to present evidence with respect to their contention that the divorcement has not been carried out in good faith.

The petitioners have completely distorted the questions decided by the Court of Appeals. On pages 7 to 9 of their petition, the petitioners set out five "questions presented" and four reasons why this Court should grant certiorari. Question 1 and reason 1 state in effect that the Court of Appeals held that the original decree entered in 1946 did not previously bind the respondent. That question was not involved. Relief was sought and granted because of a change in conditions occurring subsequent to the entry of the decree, the Court of Appeals stating:

> "At the time of the decision below, the district court did not have the benefit of the opinion of this court in *Bigelow* v. *Balaban & Katz Corp.*, 199 F. 2d 794, and may have felt that relief could not be granted to Wins-

ton, irrespective of any divorcement of the theatre operations and the producing-distributing operations of Radio-Keith-Orpheum Corporation. However, in the *Bigelow* v. *Balaban & Katz* case p. 796, this court said, with respect to the divorcement of the production-distribution and exhibiting branches of Paramount, 'We think appellant is correct in saying that this is a change which could not have been contemplated at the time of the entry of the decree * * *.' We further indicated that restrictions of the decree were not necessarily to remain in perpetuity, and said, p. 797, 'However, if the trial court's decision is to be construed as meaning that there can never be a modification of the provisions of the injunctive decree, we think it goes too far. We cannot agree with the extreme position stated by counsel for Jackson Park Theatre on argument, that the decree provides for perpetuity, and that only the sale of the theatre would constitute such a change in condition as might render the decree inapplicable'."

Petitioners' questions 3 and 5 and reason 3 claim that the decision sought to be reviewed held that the entry of a consent decree in another anti-trust suit "automatically" required that the 1946 decree entered in this cause be vacated. The Court of Appeals did not so rule, but in fact held exactly *the opposite* in *Bigelow* v. *Balaban & Katz*, 199 F. 2d 794, upon which in part the decision herein is based, the Court having stated:

> "We think appellant is correct in saying that this is a change which could not have been contemplated at the time of the entry of the decree since the Expediting Court had rejected the plea of the Department of Justice for divestiture in its original decree, entered June 11, 1946, *United States* v. *Paramount Pictures, Inc.*, 66 Fed. Supp. 323, 353. However, it does not follow that it is such a change as to require immediate relaxation of restrictions."

Petitioners' question 2 and reason 2 likewise are not in-

volved. At no place in the opinion of the court below was the burden of proof placed on the petitioners. Respondent offered considerable evidence in support of its petition for relief, and proved its case by uncontradicted evidence.

Nor did the Court of Appeals at any point change the ordinary rule of law that the findings of fact made by the District Court should not be disturbed by the Court of Appeals unless clearly erroneous. Accordingly question 4 is not involved.

The contention of petitioners in reasons 2 and 4, that the decision impairs the effectiveness of injunctive relief and is contrary to the decisions of this Court, is utterly baseless. Respondent with uncontradicted evidence met the test of *United States* v. *Swift & Company*, 286 U. S. 106 and *Bigelow* v. *Balaban & Katz*, 199 Fed. 2nd 794, by showing (1) substantial changed conditions that could not have been contemplated at the time of the entry of the original 1946 decree; namely, a complete divorcement that severed the previous affiliation of respondent with companies in the film producing and distributing business, and left respondent engaged solely in the operation of a motion picture theatre, and (2) hardship sustained as a result of the restrictive provisions of the decree against showings for more than two weeks, whereby respondent had lost more than $108,000 in six months of operation in 1952, and if the condition continued, respondent would be forced out of business completely.

I.

The uncontradicted evidence clearly establishes the fact that the consent decree in the *Paramount* case has completely severed the affiliation of the respondent with the defendant RKO Radio Pictures, Inc.

The two-week limitation is imposed only upon theatres

owned, leased or operated by a defendant. It does not apply to a theatre which is not owned, leased or operated by a defendant. (Pet. Ex. 14, R. 231; Pet. Ex. 15, R. 231-2; Pet. Ex. 18, R. 237.)

Since January 1, 1951 the Grand Theatre has not been owned, leased or operated by any defendant. Neither the petitioner, Winston Theatre Corporation, nor its parent companies are defendants in the case. Prior to the divorcement, Winston Theatre Corporation and the defendant RKO Radio Pictures, Inc. were affiliated companies controlled by a common parent corporation, but since the divorcement which became effective January 1, 1951, defendant RKO Radio Pictures, Inc. has had no interest whatever, directly or indirectly, in the operation of the Grand Theatre. Pursuant to the consent decree in the *Paramount* case, all the theatre assets, including the stock of Winston Theatre Corporation, were transferred to the new theatre corporation known as RKO Theatres Corporation, and all the production-distribution assets, including the stock of RKO Radio Pictures, Inc., were transferred to the new picture company. The holding company which had previously controlled both the production-distribution of pictures and the exhibition of pictures was dissolved. The new theatre company owns no stock in the new picture company, and the new picture company owns no stock in the new theatre company. They have no common officers or directors.

The divorcement decree provides that "on and after January 1, 1951, the new theatre company and the new picture company shall be operated wholly independently of one another and shall have no common directors, officers, agents or employees. Each of them shall thereafter be enjoined from attempting to control or influence the business or operating policies of the other by any means whatsoever." (R. 191.)

The Grand Theatre now competes for films distributed by RKO Radio Pictures, Inc. in the same manner that it competes for films of other distributors. (R. 117.) Of an aggregate of $209,000 paid by the Grand Theatre for film rental during the year 1951, only $9,800 or 4.7% was paid to RKO Radio Pictures, Inc.; of $80,700 paid during the first six months of 1952, only $1,100 or 1.4% was paid to RKO Radio Pictures, Inc. (R. 121.)

The uncontradicted evidence clearly proves that since January 1, 1951, the Grand Theatre has not been "owned, leased or operated by any defendant".

The position now taken by petitioners is a reversal of their position in a declaratory judgment suit filed by respondent seeking the same relief, that suit being dismissed without a hearing on the merits. Petitioners there made the following admissions (R. 227):

> "The *Bigelow* decree establishes certain rights and duties between the plaintiffs in that action and certain corporate defendants. The instant plaintiff (Winston Theatre Corporation) was not a party to that case and the decree in that case does not operate against the instant corporate plaintiff."

The petitioners further admitted (R. 230):

> "Nothing in the *Bigelow* decree operates upon or is directed against any property of the Winston Theatre Corporation or against the Winston Theatre Corporation itself. The *Bigelow* decree is merely operative as between the parties to the *Bigelow* case and, as pointed out in the plaintiff's original brief, equity acts *in personam* when granting injunctions."

As plaintiffs have conceded, "nothing in the *Bigelow* decree operates upon or is directed against any property of the Winston Theatre Corporation or against the Winston Theatre Corporation itself." The decree would apply only if the Grand Theatre were owned, leased or operated by a

defendant. Since January 1, 1951, the Grand Theatre has not been owned, leased or operated by any defendant, and the decree therefore does not apply to that theatre.

The opinion of the court below reviews all this evidence in detail and reaches this conclusion:

> "But we think that if a complete divorcement has in fact been had of the business of operating theatres from the business of producing and distributing motion pictures, and the decree of the New York court is being carried out in entire good faith, and the new picture company does not control or influence the operating policies of the theatre company or Winston, the district court could properly decree that the Grand Theatre is not a theatre owned, leased or operated by a defendant. In view of the decision of this court in *Bigelow* v. *Balaban & Katz Corp., supra,* which was subsequent to the findings and order of dismissal of the district court herein, and in order to permit the court to make additional findings on the issue hereinbefore indicated, this cause will be remanded. The court should be free to make such findings on the record heretofore made, or, in its discretion, to permit additional testimony to be taken on that issue."

II.

In addition to these important changes which make the 1946 decree no longer applicable to the Grand Theatre, the record also shows severe hardship suffered by the Grand Theatre.

The existence of this hardship, proven by uncontradicted evidence, is recognized by the Court of Appeals in its opinion as follows:

> "Winston points out that it operates only one theatre, the Grand, which is one of eight first run theatres in the Chicago Loop; that the seating capacity of the Grand is 1,175; that the distributors of films will not permit the Grand to bid for runs of more than two

weeks because claim has been made that the 1946 decree prevents them from so doing. Winston claims that it cannot compete with the Balaban & Katz theatres, which are also limited to runs of two weeks, because their larger seating capacity permits them to outbid the Grand, and that it cannot compete with other theatres which are not limited to the two week runs, because by that very fact they are able to bid higher for pictures than the Grand. Winston asserts that during 1951 when the Grand played a number of pictures on extended runs, pursuant to a court approved stipulation, it showed a small net profit of approximately $12,000 but for the period of approximately six months from January 1, 1952, to June 28, 1952, when it was unable to obtain pictures for runs of over two weeks, its business loss was $108,000. Winston asserts that this loss was due to the inability of the Grand Theatre to compete for better pictures because of the two-week limitation, and that if this condition continues, it will be forced out of business."

Rule 60(b) (5) of the Rules of Civil Procedure provides that the court may relieve a party from a final judgment, order or proceeding when "it is no longer equitable that the judgment should have prospective application." The cases uniformly hold that a court will modify an injunction when changing conditions make it just and equitable to do so. *United States* v. *Swift & Co.*, 286 U. S. 106; *American Press Association* v. *U. S.*, 245 Fed. 91 (C. C. A. 7); *Tobin* v. *Alma Mills*, 194 Fed. 2d 133; *Ladner* v. *Siegel*, 298 Pa. 487, 148 Atl. 699; Annotation, 68 A. L. R. 1180.

Because the distributors are applying the restrictions of the decree to the Grand Theatre, it has been unable to bid for the better pictures and is sustaining a substantial loss in its operations. (R. 118, 120, Pet. Ex. 11, R. 207.) For the first six months of 1952, its loss exceeded $108,000. Even the trial court recognized the difficulties confronting respondent's theatre, and stated, "I sympathize with your

difficulty. I do not know what the way out for them is." (R. 173.) The Court of Appeals held that there is a way out, and that relief should have been granted.

CONCLUSION.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE L. SIEGEL,
EDWARD C. RAFTERY,
Attorneys for Respondent, Winston Theatre Corporation.